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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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NO. 77-1831

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OVIDE DUNCANTELL, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its Attorney General, John L. Hill, in cooperation with Carol Vance, District Attorney, Harris County, Texas and files this its Brief in Opposition to Petitioner Ovide Duncantell, Jr.'s petition for writ of certiorari.

OPINION BELOW

In *Duncantell v. State*, 563 S.W.2d 252 (Tex.Crim.App. 1978) (en banc), the Texas Court of

Criminal Appeals ruled adversely to Petitioner's claim of illegal search and seizure. The Court reasoned that when Petitioner was stopped for a traffic violation, the police officer's observation of Petitioner's intoxicated condition, taken together with Petitioner's flight in resisting his arrest, established probable cause to search Petitioner's automobile for alcohol or narcotics. Accordingly, the Court concluded that the marijuana found on the dashboard of Petitioner's car was obtained as a result of a legal search.

The Texas Court of Criminal Appeals also rejected Petitioner's ground of error that the State's use of its peremptory strikes to eliminate blacks from the jury panel deprived him of his rights supported by the due process and equal protection guarantees of the Fifth and Fourteenth Amendments. The Texas court relied on its previous ruling in *Ridley v. State*, 475 S.W.2d 769 (Tex.Crim.App. 1972) and that of this Court in *Swain v. Alabama*, 380 U.S. 202 (1965), in holding that no systematic exclusion of blacks had been shown, and that a contrary decision would in effect abolish the Texas practice of peremptory challenges which have long been a part of the Texas system to help both the accused and the state obtain an impartial and fair trial.

JURISDICTION

The jurisdiction of this Court has been properly invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The following three questions are presented for review:

I. Whether this Court should review a Fourth Amendment claim that has been fully and fairly litigated in the state courts?

II. Whether the scope of the search of Petitioner's automobile properly extended into matchboxes located on the automobile dashboard?

III. Whether the prosecutor's use of peremptory strikes deprived Petitioner of his rights under the due process and equal protection clause?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was stopped by Houston Police in the predawn hours of November 12, 1971, for driving with his lights off and for exceeding the posted speed limit. Petitioner, who appeared intoxicated from ingestion of liquor, drugs, or both, attempted to flee from the police and became abusive and violent. A search of his vehicle yielded a matchbox containing marijuana. Petitioner was subsequently convicted in a jury trial for possession of marijuana. Petitioner's conviction was affirmed on direct appeal.

ARGUMENT

I.

THE RULING OF THIS COURT IN *STONE V. POWELL*, 428 U.S. 465 (1976), PRECLUDES REVIEW OF A FOURTH AMENDMENT CLAIM WHICH HAS BEEN FULLY AND FAIRLY LITIGATED IN THE STATE COURTS.

While Respondent recognizes that this Court's ruling in *Stone v. Powell, supra*, was made in the context of a

collateral attack on a state conviction, Respondent nonetheless urges that the rationale of this Court's ruling in *Stone v. Powell* is equally applicable to this petition for writ of certiorari. Where, as in this case, the Petitioner has been afforded the opportunity to fully and fairly litigate his Fourth Amendment claim in the state courts, the interest of preserving the integrity of the judicial process is only minimally furthered by affording an additional review of that claim by this Court. This Court has recognized that the state courts are under no less a compelling constitutional obligation to safeguard personal liberties and to uphold the law than are the federal courts. Furthermore, this Court has rejected the proposition that the state courts are less competent than the federal courts in applying federal constitutional law, especially in the context of search and seizure claims which the state courts deal with daily. Because the state courts are equally competent to safeguard federal constitutional rights, the disincentive for police misconduct created by the risk of exclusion of evidence in the state trial courts and the threat that a conviction will be overturned on direct appeal will not be appreciably enhanced by the prospect of further review on a granted writ of certiorari by this Court. Therefore, Respondent submits that further review of Petitioner's Fourth Amendment claim which has already been thoroughly litigated in the state courts is unnecessary to further deter violations of the Fourth Amendment.

II.

THE SCOPE OF THE SEARCH OF PETITIONER'S AUTOMOBILE PROPERLY EXTENDED TO MATCHBOXES ON THE AUTOMOBILES DASHBOARD.

Even if Petitioner could now be heard, his challenge to the legality of the search of his vehicle which produced

marijuana would be without merit.

During the early morning hours of November 12, 1971, as Officer Miller was performing routine patrol on Dowling Street in the City of Houston, Texas, he observed Petitioner entering Dowling Street (R. 106-108). Petitioner was driving his vehicle with his lights out though it was night (R. 108).

Petitioner subsequently turned his lights on and commenced "picking up to an excessive rate of speed" (R. 108). The officer clocked Petitioner at 47 miles per hour; the posted speed limit was 30 miles per hour (R. 110). Petitioner refused to stop after having been ordered to do so (R. 110-111). It was not until Petitioner came to a stop sign that he finally halted his vehicle (R. 113).

Officer Trumble, who accompanied Officer Miller, then approached Petitioner's car and explained to him that he was being stopped for speeding (R. 114). When asked to leave his vehicle and show his driver's license, Petitioner "proceeded on forward in his vehicle" (R. 117).

Officer Trumble managed to remove Petitioner's key from the ignition switch. However, while the officer was doing so, Petitioner "swung on the officer with his fist, striking him about the head" (R. 117). Petitioner ignored the officer's request for him to step from the vehicle (R. 116). When the officer proceeded to assist him out of the vehicle, "he started to struggle with us, fighting, we had to wrestle the man to the ground and secure him..." (R. 119). A subsequent search of the vehicle produced a matchbox which contained marijuana. The matchbox was found on the driver's side of the dashboard (R. 184).

From all indications, Petitioner was "under a form of intoxication" (R. 126-127). He had alcohol on his breath (R. 126). He had "slow reaction, slurred speech, slow reaction and movement to the eyes" (R. 127).

Petitioner does not here challenge the legality of the arrest. The record makes it abundantly clear that the police officers observed Petitioner driving his vehicle above the posted speed limit (R. 109-110). Consequently, the officers had a right as well as a duty to arrest Petitioner for the traffic violation. *Lane v. State*, 424 S.W.2d 925 (Tex.Crim.App. 1967), *cert. denied*, 392 U.S. 929 (1968).

In urging that the search of his car was unlawful, Petitioner asserts, "There were no fruits or instrumentalities of the speeding offense, for which there was probable cause to search." This assertion is unsound.

Officer Miller testified that after making the arrest for the traffic violation, he smelled alcohol on Petitioner's breath. In addition, Miller observed that Petitioner had "slow reaction, slurred speech, slow reaction and movement to the eyes." Hence, the officer justifiably formed the opinion that Petitioner was under "a form of intoxication."

It is well known, as stated by the Court of Criminal Appeals, that the usage of marijuana often produces a form of intoxication. This state of intoxication may be compounded by the use of alcohol. Simple logic dictates that such indulgence by Petitioner on the night of the arrest could have been accountable for his state of intoxication just as the usage solely of alcohol could have.

Hence, the circumstances presented in the instant case -- Petitioner's intoxicated condition, the evidence of flight and resistance of arrest -- clearly furnished probable cause to search Petitioner's vehicle for alcohol as well as for narcotics or any other contraband. It follows then that the search was legal as it was incidental to the arrest and not remote in time and place. *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Agnello v. United States*, 269 U.S. 20 (1925); *Weeks v. United States*, 232 U.S. 383, (1914).

While it may be argued, as Petitioner does, that the marijuana was not "fruit" of the traffic violation, the search was motivated not by the traffic violation, but by Petitioner's intoxicated state. Surely it is not contended that police officers possessing probable cause to stop and arrest Petitioner for one offense must be blind to plain evidence of another offense.

It is, therefore, quite clear that probable cause to search Petitioner's vehicle in the instant case developed after the arrest for the traffic offense and assault on the police officers. Thus, the holding of the Court of Criminal Appeals of Texas that the search was legal should be affirmed.

III.

THE PROSECUTOR'S USE OF PEREMPTORY STRIKES DID NOT DEPRIVE PETITIONER OF HIS RIGHT TO DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE CONSTITUTION.

Respondent asserts that Petitioner's claim that the prosecutor impermissibly used peremptory challenges to eliminate prospective black jurors from the panel is without merit in light of *Swain v. Alabama*, 380 U.S. 202 (1965). In that case, the Court recognized that the right to peremptory challenges is among the most important rights afforded to the accused. The function of the challenge is to eliminate extremes of partiality on both sides without inquiry into narrowly specified, legally cognizable bases of partiality. Thus, through the use of peremptory challenges, both sides may eliminate a juror for real or imagined partiality that may not be easily designated or demonstrated. Both white and

black prospective jurors are subject to the use of peremptory challenges, and the striking of all prospective black jurors in a case does not present a prima facia case that there has been a systematic exclusion of blacks from the jury. The presumption is that the prosecutor used the State's challenges to obtain a fair and impartial jury to try the case. Petitioner has utterly failed to overcome this presumption and therefore Respondent urges the Court to deny the petition for writ of certiorari.

CONCLUSION

For the reasons above stated, Petitioner has failed to present facts indicating that a review of his contentions is needed and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas and a member of the Bar of this Court, hereby certify that a copy of the foregoing Brief in Opposition has been served by placing same in the United States mail, postage prepaid, certified, on this the ___ day of October, 1978, addressed to Peter D. Williamson, 821 Americana Building, Houston, Texas 77002.

GILBERT J. PENA
Assistant Attorney General